RECORD AND 1 BRIEF

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No. 16-980

IN THE
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,
v.
A. PHILIP RANDOLPH INSTITUTE NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance. Judicial Watch has appeared as *amicus curiae* in multiple federal courts on numerous occasions.

Judicial Watch has a major and particular interest in the issues at stake in this litigation, deriving from its own prior NVRA litigation against Ohio. Judicial Watch filed a federal lawsuit under Section 8 of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507, in 2012 against Ohio Secretary of State Jon Husted.[2] In that complaint, Judicial Watch alleged that Ohio had been failing to make a reasonable effort to maintain the accuracy

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this *amicus* brief more than ten days prior to the date it was due.

[2] *Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. A, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), ECF No. 37, available at https://www.scribd.com/doc/304449069/Complaint-Ohio-NVRA.

and currency of its voter rolls in violation of the NVRA. *Id.* at 25. Judicial Watch argued that its members were injured due to Ohio's alleged failure to maintain accurate voter rolls. Specifically, Judicial Watch alleged Ohio's violations undermined Judicial Watch members' confidence in the legitimacy of Ohio elections, causing them doubt whether their votes would be cancelled out by votes cast in the name of outdated registrations, thereby discouraging them from voting to begin with. *Id.* at 32-33.

Judicial Watch litigated its case against Ohio for over sixteen months. Judicial Watch attorneys spent over 400 hours trying the case, incurring significant unrecovered legal fees in addition to out-of-pocket litigation expenses, including expert fees, local counsel fees, court costs, deposition costs, and travel costs. In January of 2014 the parties settled the lawsuit, agreeing to terms for Ohio to perform certain NVRA Section 8 list maintenance practices through November 2018.[3] A key provision of this Settlement Agreement was Ohio's agreement to perform an annual list maintenance "Supplemental Mailing" to voters who had no contact with Ohio's

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[3] January 10, 2014 Settlement Agreement ("Settlement Agreement"), *available at* https://www.judicialwatch.org/wp-content/uploads/2014/01/01-14-Ohio-Voter-Rolls-Settlement.pdf; *see Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. B at 39, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), ECF No. 37 (Settlement Agreement; First Amendment to Settlement Agreement).

election offices in two years.[4] The Settlement Agreement required Ohio to send the Supplemental Mailing every year, whereas Ohio had previously been sending the mailing every *two* years. The Supplemental Mailing portion of the Settlement Agreement was so important to the parties that they subsequently negotiated an amendment solely to give Ohio greater flexibility over which month of the year to initiate the Supplemental Mailing. *Id.* at 44.

Judicial Watch never would have agreed to the Settlement Agreement with Ohio and dismissed its lawsuit if it believed that the Supplemental Mailing was legally impermissible. If the Sixth Circuit's ruling in this case is allowed to stand, this key provision of Judicial Watch's Settlement Agreement could be voided. This would undermine Judicial Watch's extensive efforts to protect the integrity of elections for its Ohio members. Judicial Watch therefore has a significant interest in the subject matter of this litigation, along with a genuine organizational interest in protecting its members' voting rights and ensuring that its past efforts have not been wasted.

Judicial Watch also has an institutional interest in the cause of election integrity. This interest is shared with the people of all states whose electoral laws have been put in question by the Sixth Circuit's flawed decision. In this case in particular, if Ohio's voter rolls are not maintained in a current and accurate condition consistent with the NVRA, Ohio citizens could have their votes diluted or cancelled

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[4] *Id.* at 41.

out by unlawful ballots cast in the names of outdated or duplicate registrations. Public confidence in the integrity of the electoral process is an important interest, shared in this case by the State and people of Ohio as well as by Judicial Watch. *See Judicial Watch v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) ("If the state has a legitimate interest in preventing that harm from occurring, surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm.").

SUMMARY OF ARGUMENT

The structure of Section 8 of the National Voter Registration Act of 1993 (NVRA), makes it clear that states are assigned the primary responsibility for ensuring that their voter rolls contain only eligible voters. 52 U.S.C. § 20507. The statute gives states considerable discretion to determine what measures will constitute the reasonable efforts necessary to comply with Section 8. In particular, the NVRA says nothing about what sorts of events would warrant the sending of a statutorily prescribed notice to a voter who is believed to have moved elsewhere. A 2002 amendment to Section 8, moreover, clarified that the statute's restriction on removing a voter for failing to vote did *not* apply to removals under the subsection dealing with that statutory notice.

In enjoining Ohio's Supplemental Process, the Sixth Circuit's 2-1 ruling misapplied principles of statutory construction in a way that inverted the plain meaning of Section 8. The Sixth Circuit contended that reading the 2002 amendment to

create an exception for state procedures like Ohio's Supplemental Process would render the language of that amendment superfluous. In fact, the 2002 amendment merely clarifies what had been an apparent conflict in the NVRA, whereby Sections 8(b) and 8(d) seemed to say different things about whether a voter could be removed for failing to vote. The Sixth Circuit's argument also ignored the meaning supplied by the structure of the entire statute, which indicates that states are free to send confirmation notices on any nondiscriminatory and uniform basis.

As it exists, Ohio's Supplemental Process allows the sending of a statutory confirmation notice to any registrant has not had any voting-related activity for two years. After that, the registrant may be removed from the rolls if there is no response or further activity for two general federal elections. The Sixth Circuit further erred by holding that this sequence of events amounts to removing a voter *for* failing to vote. To the contrary the failure to vote only leads to the sending of a notice. Subsequent removal is due to the failure to respond to that notice for a period of time that may extend up to four years. The Sixth Circuit's attempt to argue otherwise relies on a misuse of the plain language of the NVRA.

The Sixth Circuit's decision affects the interests of the voters and government of the State of Ohio; Judicial Watch, which has an NVRA-related Settlement Agreement with the State; other states whose electoral laws are now in peril; and the people of the United States, who grow ever more jaded

about the integrity of their electoral system. The Sixth Circuit's error should be rectified by the Court.

ARGUMENT

I. The Sixth Circuit's Interpretation of the NVRA is Counter-Textual.

A. The Plain Language of the NVRA Allows States to Decide How to Conduct List Maintenance and When to Send a Registrant a Confirmation Notice.

Section 8, the "integrity" provision of the NVRA, requires states to maintain accurate voter rolls. 52 U.S.C. § 20507; *see* 52 U.S.C. § 20501(b)(3) and (4) (NVRA's stated purposes include "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter rolls are maintained."); S. Rep. 103-6 at 17-18, 103rd Cong., 1st Sess. (1993) (extolling "accurate and up-to-date voter registration lists").

The core requirement of Section 8 is the mandate that "each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." *Id.*, § 20507(a)(4). This provision does not list any particular steps that a "general program" must incorporate, or specify exactly how a state should go about complying. Rather, by its plain language, it only requires that states make a "reasonable effort." The precise meaning of this clause is subject to interpretation by state

legislatures and, ultimately, by federal courts. *See United States v. Missouri*, 2007 U.S. Dist. LEXIS 27640 at *19, 2007 WL 1115204 (W.D. Mo. 2007), *aff'd in part, rev'd in part on other grds.*, 535 F.3d 844 (8th Cir. 2008) ("The NVRA does not define 'reasonable effort' and the Court has found no authority that describes the parameter of the terms.").

The rest of Section 8 makes sense in the context of the fact that the statute does not describe what a state must do to comply. Accordingly, Section 8(b) provides that, whatever else such an effort might entail, it must meet certain baseline requirements. First, a state's effort must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1). And second, it must not remove a person from the voter rolls "by reason of the person's failure to vote." *Id.*, § 20507(b)(2). In 2002, that provision was modified to add that "nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections [8](c) and [8](d)" to remove ineligible voters from the rolls.

Section 8(c), again implicitly recognizing the indeterminate nature of NVRA compliance, provides that states "may" meet their list maintenance obligations by using "change-of-address information supplied by the Postal Service." 52 U.S.C. § 20507(c)(1)(A). Finally, Section 8(d) provides that, unless they confirm in writing that they have moved, registrants may not be removed from the rolls for changing addresses unless they fail to respond to a

statutory notice (the "confirmation notice") *and* fail to vote during the time period defined by the next two general federal elections. *Id.*, § 20507(d)(1), (2).

Subject to the foregoing restraints, the NVRA allows states wide latitude in designing a "general program that makes a reasonable effort" to remove ineligible registrants from the rolls. 52 U.S.C. § 20507(a)(4). Of particular relevance here is the fact that *the NVRA says nothing about the kinds of events that states may rely on as grounds for sending confirmation notices to those who are believed to have moved.* All that the NVRA requires is that a confirmation notice must be sent prior to the commencement of the statutory waiting period of two general federal elections. *Id.*, § 20507(d)(1)(B)(ii). There is simply no basis for reading any other requirements into the statute. *See Ill. Pub. Telcoms. Ass'n v. FCC*, 752 F.3d 1018, 1023 (D.C. Cir. 2014) ("we will not read into the statute a mandatory provision that Congress declined to supply"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012) (omitted-case canon); *Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation.") (citation omitted); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function.") (citations omitted); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (citations omitted).

Accordingly, the NVRA would not prevent Ohio from sending confirmation notices every year to every registrant in the State, although this undoubtedly would be quite expensive. It is equally clear that the NVRA would not prohibit Ohio from sending confirmation notices on a "uniform" and "nondiscriminatory" basis to any meaningful subset of the foregoing, for example, to residents who have ceased filing state tax returns, which may suggest that they have moved. In the same vein, nothing in the NVRA prohibits Ohio from sending a confirmation notice to all registered voters who have not engaged in any voter activity in the preceding two years, per the State's "Supplemental Process." The State's leeway to do so is fully consistent with the design of the NVRA, which generally accords states a great deal of freedom in crafting their list maintenance programs. *See K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) ("the plain meaning of [a] statute" depends on "the particular statutory language at issue, as well as the language and design of the statute as a whole.") (citations omitted).

Finally, the conclusion that Ohio may use any reasonable basis to trigger the sending of confirmation notices is only made more compelling by the 2002 amendment to the NVRA. That amendment made it clear that the bar contained in Section 8(b) on any removal from the rolls "by reason of [a] person's failure to vote" did *not* apply to a removal for failing to respond to a confirmation notice. *Id.*, § 20507(b)(2).

B. The Sixth Circuit's Ruling Disregards the Plain Meaning of Section 8 of the NVRA.

In holding that the NVRA proscribes Ohio's Supplemental process, the Sixth Circuit misapplied canons of statutory construction and ultimately mandated an outcome that disregards, and even is contrary to, the plain meaning of Section 8.

The Sixth Circuit was first compelled to explain the 2002 amendment to the NVRA. This amendment qualified Section 8's proviso that no one could be removed from the voter rolls "by reason of [their] failure to vote," by adding that "nothing in this paragraph may be construed to prohibit a State from using the procedures described in," *inter alia*, Section 8(d), to remove a voter from the rolls. 52 U.S.C. § 20507(b)(2). In other words, Section 8(b)(2) was amended precisely in order to make clear that state procedures – like Ohio's Supplemental Process – that involved sending Section 8(d) confirmation notices were *not* proscribed by that paragraphs' other restriction on removals for failure to vote. This amendment seems to bar the very arguments made by Respondents below and accepted by the Sixth Circuit.

In response to this point, the Sixth Circuit contended that reading Section 8(b)(2)'s exception as a "mere reiteration" of Section 8(d)(1) would make the exception superfluous, contrary to accepted canons of statutory construction. App. 18a. Accordingly, the Sixth Circuit concluded that the

amendment must have been intended to apply the prohibition it contained to all statutes. App. 20a. By this reasoning, the 2002 amendment was seen to specially refer to – rather than to specially except – statutes like Ohio's Supplemental Process.

In the course of its reasoning the Sixth Circuit misapplied the statutory canon regarding superfluous language. Prior to its amendment, the NVRA merely provided that no person may be removed from the rolls "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). However, two subsections down from that clause, the NVRA provided that a person who has changed residence and who has failed to respond to a confirmation notice may be removed if he or she "has not voted or appeared to vote . . . in an election during the period beginning on the date of the notice and ending after the date of the second general Federal election." *Id.*, § 20507(d)(1)(B)(ii).

These provisions appear openly to conflict. Perhaps a reviewing court would have found the proper way to reconcile these provisions using appropriate canons of statutory construction. In any event, the 2002 amendment removed all doubt, resolving the conflict by clarifying that that Section 8(b) did not bar the use of Section 8(d) to remove ineligible registrants. Statutory language that clarifies a provision is not superfluous. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) ("The phrase 'any other person' performs a significant function simply by clarifying that subparagraph (B) excludes the persons enumerated

in subparagraph (A)."). The Court in *Atlantic Research Corp.* also issued a pertinent warning, when it observed that "our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity." *Id.* The Sixth Circuit has adopted just such a "dubious construction," insisting that language plainly intended to exempt the use of confirmation notices was actually meant to include and refer to them.

The Sixth Circuit's next innovation is even more misguided. After determining that Section 8(b)(2) did not contain an exception for procedures like the Supplemental Process, the Court asked whether that process "result[s] in the removal" of voters for failing to vote. App. 21a (internal citation and quotation omitted). In finding that it does, the Sixth Circuit defined "result" as strict, but-for causation, however attenuated. *Id.*

That interpretation is not consistent, however, with the "ordinary meaning" of the words of the statute. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (citations and internal quotations omitted). In ordinary language, when it is said that one event is the "result" of another, the initiating event is usually the one closest in time to the caused event. To put it more concretely, it ordinarily would be said that the Supplemental Process "resulted in" a confirmation notice being sent. In turn, the failure

to respond to that confirmation notice, along with the passage of time until the second general federal election, "resulted in" a registrant being removed from the rolls. No one in ordinary speech uses the terms "result" or "cause" or "consequence" to refer back indiscriminately and equally to all prior causes, however remote, in a causal chain. Ordinary speech limits the reference by a sense of nearness.

And lawyers have a word for this. "The term 'proximate cause' is 'shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.'" *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring in judgment) (citation omitted). "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Id.* (citation omitted). Applying this principle here, the proximate cause of the removal of voters under the Supplemental Process is their failure to respond to a confirmation notice, along with the passage of a statutory period of time. Registrants are *not* removed for failing to vote.

To reach the conclusions that it did, the Sixth Circuit majority engaged in a needlessly convoluted analysis of the language of Section 8. Circuit Judge Siler, who dissented from the majority's approach to the NVRA, had it right when he observed that "[t]his seems to be a much simpler process than as outlined in the majority opinion." App. 33a.

> The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do so. It removes registrants only if (1) they have not voted or updated their registration for the last two years, (2) also failed to respond to the address-confirmation notice, and (3) then failed to engage in any voter activity in four consecutive years, including two consecutive Federal elections following that notice.

App. 34a.

II. It is Important that the Court Address this Issue Now.

The Court's guidance urgently is needed to restore the meaning and efficacy of the NVRA. The correct interpretation of Section 8 of that statute has significant consequences for the State and people of Ohio, for Judicial Watch, for other states whose electoral statutes are placed at risk by the Sixth Circuit's flawed interpretation, and for the people of the United States, who share a common interest in electoral integrity.

Ohio has a legitimate interest in fostering election integrity by removing ineligible voters from the rolls. As the Court has observed:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and

> accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford v. Marion County Election Board, 553 U.S. 181, 196 (2008).

For its part, Judicial Watch is institutionally devoted to the cause of election integrity. This interest was clearly demonstrated when Judicial Watch sued the State of Ohio in 2012 under Section 8 of the NVRA for an alleged failure to conduct proper list maintenance. In January 2014, the parties executed a Settlement Agreement resolving the matter, which expires on November 10, 2018. *Amicus Curiae* Brief of Judicial Watch, Inc. in Support of Defendant-Appellant and Affirmance, Ex. B, *Ohio A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. July 27, 2016), ECF No. 37. The centerpiece of that Settlement Agreement is a provision requiring the sending of confirmation notices on an annual basis to voters who have not engaged in voting-related activity for a two-year period. *Id.* at 41, 44. The legal status of this provision obviously is called into doubt by the Sixth Circuit's ruling. Moreover, the fact that a crucial term may be invalid renders the status of the entire Settlement Agreement questionable, as it is not clear that Judicial Watch has received its bargained-for consideration. Certainly the value of the agreement

to Judicial Watch is considerably diminished. As a practical matter, these developments raise the real prospect of further litigation.

The Sixth Circuit's ruling calls into question the previously settled electoral laws of a number of other states. Most obviously, it affects the State of Georgia, which has been sued over a similar statute. *See Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. 2016). But it also is likely to lead to lawsuits in other states, especially given the fact that the Sixth Circuit's decision undermines the use of voter inactivity anywhere "in the chain" of events leading up to the cancellation of a registration. In Montana, election administrators are required to conduct list maintenance procedures every other year, and one of their options is "a targeted mailing," which may be a forwardable confirmation notice, to voters who failed to vote in the preceding federal general election. MONT. CODE ANN. § 13-2-220(1)(c) (2015). In Missouri, election officials conduct canvasses every two years, and may canvass all voters, or "only those voters who did not vote in the last general election." MO. REV. STAT. § 115.181 R.S. Mo. (2016). Tennessee law requires that, where a voter fails to vote or update his or her registration over a period of two consecutive November elections, the county must mail a confirmation notice. TENN. CODE ANN. § 2-2-106(c). West Virginia law provides that in addition to the NCOA procedure, all counties using the NCOA information from the U.S. Postal Service "shall also, once each four years . . . conduct the same procedure by mailing a confirmation notice

to those persons . . . who have not updated their voter registration records and have not voted in any election during the preceding four calendar years." W.VA. CODE § 3-2-25(j) (2016). Nor is Judicial Watch able to represent here that the foregoing list is exhaustive.

Finally, a ruling resolving the dispute about the correct operation of the NVRA is in the interest of the people of the United States. It is easy to find polls and surveys showing that Americans have little faith in the integrity of their elections and postulating that this partly explains low voter turnout.[5] Restoring public confidence in the integrity of elections is in the national interest. In *Crawford*, aside from states' interest in preventing fraud, the Court identified this second important interest, namely, "public confidence in the integrity of the electoral process," which "has independent significance, because it encourages citizen participation in the democratic process." 553 U.S. at 197; *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); *see also Doe v. Reed*, 561 U.S. 186, 197 (2010) (the "State's interest in preserving the integrity of the electoral process" was

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[5] *See, e.g.*, Pippa Norris, Holly Ann Garnett and Max Grömping, *Why Don't More Americans Vote? Maybe Because They Don't Trust U.S. Elections*, Wash. Post, December 26, 2016, available at goo.gl/zAXsiW .

"particularly strong with respect to efforts to root out fraud," citing *Crawford* and *Purcell*).

CONCLUSION

For the foregoing reasons, *amicus* Judicial Watch respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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